84-1024

Office - Supreme Court, U.S.
FILED
DEC 15 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF
THE UNITED STATES

Term, 1984

IN RE: GEORGE E. EWING, DEBTOR

DONALD R. CALAIARO, TRUSTEE,

Appellant-Petitioner

v.

PITTSBURGH NATIONAL BANK and
COVENTRY CARE, INC.,

Appellees

1. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2. APPENDIX

ROBERT O LAMPL
Counsel for Appellant
The Renshaw Building
Ninth Street and Liberty Avenue
Pittsburgh, PA 15222
(412) 392-0330

QUESTION PRESENTED FOR REVIEW

WHETHER THE INVOLUNTARY SALE OF A DEBTOR'S PLEDGED STOCK BY A CREDITOR, WITHIN ONE YEAR OF THE ORDER FOR RELIEF, IS A TRANSFER WITHIN THE MEANING OF THE BANKRUPTCY CODE §§101(41) and 548(d)(1), 11 U.S.C. §101(41) and 11 U.S.C. §548(d)(1).

Petitioner, Donald R. Calaiaro, Trustee, requests the allowance of a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered September 18, 1984.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURT BELOW

Memorandum Opinion and Order of the Honorable Gerald K. Gibson, Bankruptcy Judge, entered September 19, 1983 is reported at 33 B.R. 288 (Bkrtcy W.D.Pa. 1983) and is appended at A-21.

Memorandum Opinion and Order of the Honorable Carol Los Mansmann, District Judge, entered, January 18, 1984 is reported at 36 B.R. 476 (W.D.Pa 1984) and is appended at A-32.

Judgment Order of the Honorable Seitz, Beck and Rosenn, Circuit Judges, entered September 18, 1984 is unreported and is appended at A-43.

Denial of Petition for Rehearing by Available Circuit Judges entered October 15, 1984 is unreported and is appended at A-45.

STATEMENT OF THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED

The Judgment Order of Seitz, Becker and Rosenn, Circuit Judges for the United States Court of Appeals for the Third Circuit was entered on September 18, 1984. The Appellant's Petition for Rehearing was denied on October 15, 1984. This Petition seeking determination and relief as provided in 28 U.S.C. §2106 is filed within ninety (90) days of the entry of the judgment in accordance with 28 U.S.C. §§1254(1) and 2102(c).

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by virtue of 28 U.S.C. §1254(1).

STATUTES WHICH THE CASE INVOLVES

1. UNITED STATES BANKRUPTCY CODE PROVISIONS

A. 11 U.S.C. §101 DEFINITIONS

11 U.S.C. §101(41) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest. Pub.L.95-598, Nov. 6, 1978, 92 Stat. 2549; Pub.L. 97-222, §1, July 27, 1982, 96 Stat. 235.

B. 11 U.S.C. §548 FRAUDULENT TRANSFERS AND OBLIGATIONS

11 U.S.C. §548(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor -

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on any interest transferred, may retain any lien transferred, or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against

whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

(2) In this section -

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; and

(B) a commodity broker, forward contract merchant, stockbroker, or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment. Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, §5, July 27, 1982, 96 Stat. 236.

C. 11 U.S.C. §550 LIABILITY OF TRANSFEREE OF AVOIDED TRANSFER

11 U.S.C. §550(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548,

549, or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under subsection (a)(2) of this section from -

(1) a transferor that takes for value, including satisfaction or securing of a present or antecedent debt in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of -

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by such transferee from such property; and

(B) any increase in value as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes -

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property;

(E) discharge of any lien against such property that is superior or equal to the rights of the trustee; and

(F) preservation of such property;

(e) An action or proceeding under this section may not be commenced after the earlier of -

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; and

(2) the time the case is closed or dismissed. Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2601.

2. COMMONWEALTH OF PENNSYLVANIA UNIFORM COMMERCIAL CODE PROVISIONS

A. 13 Pa.C.S. §9311 ALIENABILITY OF RIGHT OF DEBTOR; JUDICIAL PROCESS

13 Pa.C.S. §9311 The rights of a debtor in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default. 1979, Nov. 1, P.L. 255, No. 86, §1, effective Jan. 1, 1980.

B. 13 Pa.C.S. §9504 RIGHT OF SECURED PARTY TO DISPOSE OF COLLATERAL AFTER DEFAULT; EFFECT OF DISPOSITION

13 Pa.C.S. §9504(a) Disposition of collateral and application of proceeds. - A secured party after default may sell, lease or otherwise dispose of any of all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to Division 2 (relating to sale). The proceeds of disposition shall be applied in the order following to:

(1) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party.

(2) the satisfaction of indebtedness secured by the security interest under which the disposition is made; and

(3) the satisfaction of indebtedness secured by any subordin ate security interest in the collateral if written notificiation of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(b) Rights of parties in case of surplus or deficiency. - If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(c) Manner of disposition. - Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before renunciation by the debtor of his rights) written notice of a claim of any interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(d) Rights of purchaser for value of disposed collateral. - When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the rights of the debtor therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this chapter or of any judicial proceedings:

(1) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(2) in any other case, if the purchaser acts in good faith.

(e) Right of subrogation of person liable to secured party. - A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this division. 1979, Nov. 1, P.L. 255, No. 86, §1, effective Jan. 1, 1980. As amended 1982, Nov. 26, P.O. 696, No. 201, §1, effective in 180 days.

STATEMENT OF THE CASE

In September of 1977, the Debtor, George Ewing (Ewing), pledged 75,000 shares of Class B Common Stock and 9,500 shares of Class A Common Stock in Coventry Care, Inc. (Coventry Care) to Pittsburgh National Bank (PNB) as security for a loan of $67,000.00.

Ewing subsequently defaulted on the loan and in March of 1980 PNB commenced an involuntary sale of his pledged shares of Coventry Care stock to satisfy his obligation on the loan. The sale of this stock was finalized on April 10, 1980 when Coventry Care bought all of the shares of stock for $72,500.00 (an amount equal to the balance of the unpaid principal of $61,602.10 plus interest). In August of 1980, only four months later, Ewing commenced a voluntary Chapter 11 Case.

The complaint, which is the subject of this Petition, was subsequently filed by the Trustee, Donald R. Calaiaro, claiming

that the involuntary sale consummated on April 10, 1980 by PNB was a transfer within the meaning of §548 of the Bankruptcy Code and that the Trustee is entitled to avoid the transfer.

The Bankruptcy Court held that the involuntary sale was a transfer within the meaning of Bankruptcy Code §548(a)(2), 11 U.S.C. §548(a)(2), and therefore voidable. The United States District Court for the Western District of Pennsylvania reversed reasoning that the pledge of the stock was the only transfer and was outside the one year limitation of §548. In other words, the District Court held that the involuntary liquidation sale was not a transfer. The United States Court of Appeals for the Third Circuit affirmed the District Court without opinion. The Trustee's Petition for Rehearing was subsequently denied.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction over the subject matter of this case exists and continues to exist in the United States Bankruptcy Court for the Western District of Pennsylvania pursuant to 28 U.S.C. §1471 and §1334 where Donald R. Calaiaro, as the Trustee in the Bankruptcy Case of George E. Ewing, commenced this Action by filing a complaint.

ARGUMENT

I. The Writ of Certiorari Should Be Allowed To Review The Third Circuit Opinion In Order To Resolve The Conflicts Among the Circuit Courts Of Appeal.

The issue in this case is whether or not the involuntary sale of pledged collateral is a transfer within the the meaning of Bankruptcy Code §548. This involves the determination of the meaning of the term "transfer" under §548 of the Bankruptcy Code. The holding of the Third Circuit in this case (that such a sale is not a transfer) is in conflict with the Fifth Circuit

holdings of Durrett v. Washington National Insurance, 621 F.2d 201 (CA5 1980) and Abramson v. Lakewood Bank and Trust Company, 647 F.2d 547 (CA5 1981) and the Eighth Circuit holding in In Re: Hulm, ____ F.2d ____, 11 C.B.C. 152 (CA8 1984). In those cases the Fifth Circuit and the Eighth Circuit, respectively, held that an involuntary foreclosure sale is a transfer under Bankruptcy Code §548.

II. The Writ Of Certiorari Should Be Allowed Because The Opinion Below Is In Contradiction To The Obvious Intent Of Congress.

The Third Circuit Court of Appeals interpreted Bankruptcy Code §548 when the underlying Adversary Proceeding was commenced. Section 548 was in the form set forth previously. Since that time the Bankruptcy Amendments and Federal Judgeship Act of 1984 has amended §548 to state:

> (a) The Trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, [if the debtor] voluntarily or involuntarily/ (additions are indicated by underlining and deletions by brackets)

This amendment was simply meant to make explicit where it was already implicit in the meaning of this section; that any transfer of an interest of a debtor is potentially subject to §548.

The Bankruptcy Code writers recognized that in some situtions the debtor would be a passive participant as creditors consummated involuntary transfers of collateral for less than reasonably equivalent value. Bankruptcy Code §548 is intended to protect the debtor and the Bankruptcy Estate from any type of inadequate transfer of the debtor's property interest, whether legal or equitable. The Third Circuit's holding frustrates such Congressional purpose.

III. The Writ Of Certiorari Should Be Allowed Because The Decision Of The Third Circuit Concerning The Meaning Of Transfer Within §548 Of The Bankruptcy Code Is In Conflict With The Pennsylvania Law Concerning The Property Rights Of Debtors.

The Circuit Court incorrectly interpreted Pennsylvania Law as it applies to the Bankruptcy Code. Pennsylvania Law determines the rights of debtors and creditors under the Bankruptcy Code as used in Pennsylvania. Under Pennsylvania Law when the debtor transfers collateral to a creditor to secure an obligation, the debtor transfers only a security interest; he retains an equitable interest. Comment 1 on 13 Pa.C.S.A. §9311 provides:

> "Purposes: 1. To make clear that in all security transactions under this Article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach." Uniform Commercial Code Comment to 13 Pa.C.S.A. §9311.

Pittsburgh National Bank contended that when George Ewing pledged his stock to Pittsburgh

National Bank as security for a loan that, at that time, he transferred all of his interest in the stock. However, under Pennsylvania Law, upon a contract of pledge, title in the pledged property remains in the pledgor subject to a lien in favor of the pledgee in the amount of the debt. Further, the pledgee is liable for return of the pledged property upon satisfaction of the obligation. In Re: Gordon, 334 Pa. 262, 25 A.2d 304 (1942). It is clear under Pennsylvania law that at the time Pittsburgh National Bank consummated its involuntary sale, the debtor had an equitable interest in the stock beyond the value needed to secure repayment of the loan. The Circuit Court of Appeals for the Third Circuit misapprehended the meaning and purpose of providing a creditor with a security interest. The Pennsylvania Uniform Commercial Code recognizes

a right in the debtor to collateral which he has pledged to a creditor. 13 Pa.C.S. §9311.

Further, the pledge of collateral is not a grant of absolute ownership. The Pennsylvania Uniform Commercial Code imposes an affirmative obligation on the secured creditor to dispose of collateral in a commercially reasonable manner to protect the interests in that collateral which the debtor still possesses. 13 Pa.C.S. §9504. If as the Court of Appeals for the Third Circuit indicated the pledging of property as security is equivalent to the absolute transfer contemplated under §548 of the Bankruptcy Code, then there would be no need for the creditor to account to the debtor for surplus received from the forced sale of collateral. Obviously, the decision below contradicts Pennsylvania law and will cause great confusion in commercial transactions. This

improper interpretation of the Uniform Commercial Code has national effect and potentially devastating economic impact.

WHEREFORE, Petitioner respectfully prays that the Writ of Certiorari be allowed.

Respectfully submitted,

ROBERT O LAMPL
Counsel for Petitioner
The Renshaw Building
Ninth Street and Liberty Avenue
Pittsburgh, PA 15222
(412) 392-0330

In the Matter of George R. EWING, Debtor.

Donald R. CALAIARO, Esq., Trustee, Plaintiff,

v.

PITTSBURGH NATIONAL BANK and Coventry Care, Inc., Defendants.

Bankruptcy No. 80-1227.
Adv. No. 82-104.

United States Bankruptcy Court, W.D. Pennsylvania.

Sept. 19, 1983.
(33 B.R. 288)

MEMORANDUM OPINION

Gerald K. Gibson, Bankruptcy Judge.

The matter presently before the Court is a complaint to avoid a fraudulent transfer, wherein Trustee alleges that secured creditor's involuntary pre-petition sale of stock pledged by Debtor for less than its reasonably equivalent value constitutes a fraudulent transfer under §548 of the Bankruptcy Code and the Pennsylvania Fraudulent Conveyance Act. Trustee also alleges that the foreclosure sale was not conducted in conformity with

reasonable commercial practices as required by the Uniform Commercial Code.

The Court has agreed to confine its present determination to the issue of fraudulent conveyance under the Bankruptcy Code. The remaining issues of fraudulent conveyance under state law and commercial unreasonableness raised in plaintiff's complaint and defendants' motions to strike will be considered at a later date, if necessary.

The facts are briefly as follows. Commencing on or about November 12, 1968, and at various times thereafter, Debtor borrowed sums of money form Pittsburgh National Bank, hereinafter "PNB"; and executed promissory notes and pledge agreements to secure said debt. In September, 1977, Debtor borrowed the sum of $67,000.00 from PNB at which time he pledged 75,000 shares of Class B common stock and 9,500 shares of Class A common stock in Coventry Care, Inc. hereinafter

"CCI" to secure the repayment of his indebtedness.

Upon Debtor's default, PNB commenced an involuntary sale of Debtor's shares of CCI. The sale was consummated on April 10, 1980, at which time, CCI purchased the shares for the amount of $72,000.00. Some months later, in August, 1980, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The case was subsequently converted to a Chapter 7.

The parties have stipulated that prior to the closed bid sale, PNB advertised the sale in the Wall Street Journal and Pittsburgh Post Gazette. Notice of sale and conditions thereto were sent to those parties who appear on Exhibit D of the Stipulation.

In his brief, Trustee presents the following arguments. A sale of the Debtor's equity interest in secured collateral can be interpreted as a fraudulent conveyance pursuant to §548 of the Bankruptcy Code, which allows the Trustee to avoid any transfer of an interest in debtor's property within one year prior to the filing of the bankruptcy petition while

debtor is insolvent for which he receives less than reasonably equivalent consideration. Trustee further argues that the transfer, for purposes of §548, occurred at the time of sale in April, 1980. Prior thereto, PNB's interest in the stock was limited to that necessary to secure repayment of the loan; and Debtor retained property rights in the remaining value. Finally, Trustee asserts that §548 is applicable to involuntary foreclosures as well as voluntary transfers by the Debtor.

In its brief in support of its motion to dismiss Trustee's complaint, PNB argues as follows. The transfer which Debtor claims to have been fraudulent within the meaning of §548 occurred outside the one-year period prior to the filing of the bankruptcy petition and is therefore not vulnerable to attack under §548. PNB asserts that by virtue of the Uniform Commercial Code, a security interest in instruments is perfected by possession. Since PNB had possession of the securities

at all times subsequent to the pledge, its security interest was perfected as against a bona fide purchaser. Therefore, the transfer occurred at the time of the pledge, in September, 1977; or at the latest, upon execution of a new pledge agreement in 1978.

In its brief in support of its motion to dismiss, CCI argues that a sale brought by a secured creditor to enforce its perfected lien in Debtor's property is not a fraudulent conveyance within the meaning of §548. CCI first asserts that §548 only pertains to actions taken by the Debtor, and does not include actions taken by a secured creditor in foreclosure upon the collateral. CCI further asserts that since the transfer occurred upon delivery of possession of the pledged stock to PNB in September, 1977, §548 is inapplicable.

Having summarized the arguments of counsel, the Court now turns to the relevant provisions of the Bankruptcy Code. Section 548(a)(2)(A) provides as follows:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor-

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

Section 101(40) defines "transfer" as follows:

(40) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

Section 548(d)(1) further states as follows:

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

The Court now examines related case law in order to ascertain whether an involuntary transfer by a secured creditor constitutes a transfer with the meaning of §548, as well as when the transfer is deemed to have occurred.

Counsel for CCI relies upon the case of Lovett v. Shuster, 633 F.2d 98 (8th Cir. 1980) decided under the Bankruptcy Act. Therein, the Court considered whether the transfer of collateral for purposes of 67(d) (the fraudulent conveyance provision) took place upon debtor's

delivery of stock to the secured party; or upon assignment of title to the secured party. The Court held that for purposes of 67(d)(2), collateral was transferred upon delivery of possession. However, in Lovett, supra, the factual situation was significantly different from that at bar for the foreclosure sale took place some months after the filing of the petition in bankruptcy .

Counsel for the defendants cite the case of In Re Alsop, 14 B.R. 982, 8 B.C.D. 335, 5 C.B.C. 2d 797 (Bkrtcy. D. Alaska 1981) in support of their position that a foreclosure sale within one year of bankruptcy does not constitute a transfer within the meaning of §548. However, other courts have reached different results. In Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), Debtor-In-Possession under the Bankruptcy Act sought to vacate the transfer of real property nine days prior to filing. The Fifth Circuit affirmed the District Court's holding that a non-judicial sale constituted a transfer within

the meaning of §67(d). The Court further held that the sale price of $115,400.00 for a parcel valued by the Court at $200,000.00 was not a fair equivalent and was therefore avoidable under §67(d).

In Abramson v. Lakewood Bank and Trust Company, 647 F.2d 547 (5th Cir. 1981) cert. denied, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982), the Fifth Circuit reversed a lower court decision that a non-judicial foreclosure sale of debtor's land was not a transfer within the meaning of §67(d). The Court states: ". . . as this transfer occurred within the one-year period, it is subject to being set aside as fraudulent if it was made without fair consideration." (p.549).

Other courts have reached similar results under the Bankruptcy Code. In In re Jones 20 B.R. 988 (Bkrtcy. E.D.Pa., 1982), Judge Goldhaber held that where a sheriff's sale within one year of filing while debtor was insolvent failed to bring a reasonably equivalent value, it was avoidable under §548(a)(2).

Similar conclusions have been reached in In re Smith, 21 B.R. 345 (Bkrtcy. M.D.Fla. 1982); and Matter of Marshall, 15 B.R. 738 (Bkrtcy. W.D.N.C. 1981).

[1] While the foregoing cases deal with foreclosure upon real estate, the issue at bar concerns the involuntary sale of securities pledged as collateral. Under Pennsylvania law, upon a contract of pledge, title in the pledged property remains in the pledgor subject to a lien in favor of the pledgee for the amount of the debt. Further, the pledgee is liable for return of the pledged property upon satisfaction of the obligation. In re Gordon, 344 Pa. 262, 25 A.2d 304 (1942). Moreover, under the provisions of the Pennsylvania Uniform Commercial Code applicable to the pledge at bar, the secured creditor must account to the debtor for any surplus resulting from the secured creditors disposition of the collateral upon debtor's default. 13 Pa.C.S.A. §9504(b).

[2] In the case at bar, PNB was the

holder of a properly perfected security interest in the securities pledged as collateral for repayment of Debtor's obligation. However, Debtor retained an interest in the collateral to the extent that its value exceeded PNB's secured debt. It was only upon sale of the collateral to CCI that Debtor's interest therein was extinguished. Therefore, the Court is convinced that the transfer, for purposes of §548, occurred on April 10, 1980; the date of sale.

[3] Based upon the foregoing, the Court is satisfied that for purposes of §548, the involuntary sale of stock in the case at bar constituted a transfer within one year of the filing of the petition while Debtor was insolvent, or rendered insolvent thereby. If after further testimony it is determined that the sale was not for reasonably equivalent value, the transfer will be avoided pursuant to §548.

In Re George R. EWING, Debtor.

Donald R. CALAIARO, Trustee, Plaintiff,

v.

PITTSBURGH NATIONAL BANK and
Coventry, Care, Inc., Defendants.

Civ. A. No. 83-2640.
Bankruptcy No. 80-1227.
Adv. No. 82-104.

United States District Court,
W.D. Pennsylvania.

Jan. 18, 1984
(36 B.R. 476)

MEMORANDUM OPINION

Mansmann, District Judge.

The instant matter is before this Court on appeal from an Order of the Bankruptcy Court for the Western District of Pennsylvania, dated September 19, 1983, which denied motions to dismiss the Plaintiff's Complaint made by Coventry Care, Inc. (CCI) and Pittsburgh National Bank (PNB).[1]

---

1 Also before this Court are two motions: the Trustee's motion to quash the appeal and CCI's motion for withdrawal of reference. With respect to the first motion, the Trustee has asserted that the Order of the Bankruptcy

After careful consideration of the record before this Court, the briefs filed[2] and oral arguments of counsel, this Court reverses the Order of the Bankruptcy Court and dismisses the Plaintiff's complaint.

* * *

Factual Background

The facts of this matter were stipulated by the parties before the Bankruptcy Court. Those pertinent to the issues raised by the instant appeal are as follows:

Commencing on or about November 12, 1968, George R. Ewing (the Debtor), borrowed various

---

1(cont) Judge is interlocutory and that since leave to appeal was not requested by CCI, its appeal should be dismissed. However, since the notice of appeal was timely filed, we choose, in the discretion of this Court as permitted under FED.R.BANKR.P. 8003(a)(3), to deny the trustee's motion and to determine the appeal on its merits. With respect to CCI's motion for withdrawal of reference, in light of this opinion, it is denied as moot.

2 Although PNB did not appeal from the September 19, 1983 Order, it has filed an amicus curae brief with the permission of this Court.

sums of money from PNB. To secure the debt, the Debtor executed promissory notes and pledge agreements.

On September 30, 1977 the Debtor borrowed $67,000.00 from PNB and executed a 90-day note and pledge agreement. At this time, the Debtor pledged 75,000 shares of class B common stock and 9,500 shares of class A common stock in CCI. Thereafter, the loan was extended for various additional 90-day periods. Further, on or about June 27, 1978, the Debtor executed a promissory note and pledge agreement[3] to secure an additional 90-day extension of the debt.

Following a default in repayment of the debt, PNB noticed and held a closed bid sale to liquidate th stock pursuant to its rights

---

3 It is unclear from the record if new shares of CCI were pledged this date, or if the previously pledged shares were repledged. However, since both dates are outside of the one year period prior to the filing of the petition in bankruptcy, this distinction is irrevelant.

under the June 27, 1978 note.

The sale of the stock was consummated on April 10, 1980 when it was sold to CCI for $72,500.00.

Thereafter, in August of 1980, the Debtor filed his petition in bankruptcy.[4]

* * *

The issue before this Court is whether the debtor's property was transferred within the meaning of 11 U.S.C. §548 within one year prior to his filing of the bankruptcy petition. More specifically, this Court is faced with determining whether a "transfer" of the debtor's property, as defined in 11 U.S.C. §548 took place either in September of 1977 or on June 27, 1978 (the dates the Debtor pledged his securities) or on April 10, 1980 (the date PNB sold the stock).

---

4 Initially, the Debtor commenced a voluntary Chapter 11 case, but this was later converted to a Chapter 7 case.

[1] For the reasons set forth below, this Court finds that the "transfer" within the meaning of 11 U.S.C. §548 took place when the Debtor pledged his shares of CCI to PNB, either in September of 1977 or on June 27, 1978. Since this transpired outside of the one year pre-petition period set forth in 11 U.S.C. §548(a), this "transfer" is not avoidable pursuant to the Bankruptcy Code, notwithstanding that the actual sale of the stock by PNB took place on April 10, 1980, less than one year before the Debtor filed his petition in bankruptcy.

* * *

11 U.S.C. §548 provides that under certain conditions:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition . . .

11 U.S.C. §548 further provides the definition of "transfer":[5]

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee . . .

[2] In order to determine under the Bankruptcy Act when a transfer becomes perfected to the extent that the transferee has rights superior to that of a bona fide pruchaser from the transferor, it is necessary to refer to

---

5 It is acknowledged that 11 U.S.C. §101(40) generally defines "transfer" as " . . . every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest". However, the specific definition of "transfer" set forth in 11 U.S.C. §548(d)(1) is applicable to §548 and controls here.

the applicable state law, Appeal of Copeland, 531 F.2d 1195 (3d Cir. 1976), which governs the secured interests asserted by the parties in a bankruptcy proceeding. In the Matter of Bollinger Corp., 614 F.2d 924 (3d Cir. 1980).

In this connection, Pennsylvania's Uniform Commercial Code sets forth when a security interest is perfected with regard to securities.

13 PA. CONS. STAT. ANN. §9303(a) (Purdon Supp. 1983) provides, in pertinent part:

A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken . . .

More specifically, 13 PA. CONS. STAT. §9304(a) (Purdon Supp. 1983) sets forth when a security interest in perfected in instruments:[6]

---

6 "Instrument" is defined in 13 PA. CONS. STAT. ANN. §9105(a) (Purdon Supp. 1983) as "(a) negotiable instrument (defined in §3104), or a security (defined in §8102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment".

A security interest in . . . instruments . . . can be perfected only by the secured party's taking possession . . .

Therfore, it is quite clear, when applying state law, more particularly, Article 9 of Pennsylvania's Uniform Commercial Code to the instant situation, that the perfection of PNB's security interest in the Debtor's stock certificates took place in either September of 1977 or on June 27, 1978 when the stock was pledged and PNB was given possession of same.

In Appeal of Copeland, 531 F.2d 1195 (3d Cir. 1976) the U.S. Court of Appeals for the Third Circuit , after applying state law (Article 9 of Delaware's Uniform Comercial Code), held that the creditor's security interest in the debtor's securities was perfected when the stock certificates were pledged (when the escrow agent gained possession of the stock certificates in that case). More recently, when faced with an analogous situation, in Dean Witter Reynolds, Inc. v. MacQuown, 717

F.2d 859 (3d Cir. 1983) the Court of Appeals held that under Pennsylvania law, for the purposes of the bankruptcy act,[7] a transfer of realty[8] is completed i.e., "is good as against a subsequent bona fide purchaser . . . when the deed is recorded . . . " Id. at 863. Similarly, we find for the purposes of the bankruptcy act, a security interest in securities perfected when the stock certificates are pledged.

---

7 §14(c)(4) of the old bankruptcy act was at issue and was analogized to §67(d)(5) which parallels the current 11 U.S.C. §548(d)(1).

8 This Court would also note that the Bankruptcy Court relied on two Fifth Circuit cases which dealt with the transfer of real property interests (deeds of trust) under the old bankruptcy act, Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981) and Durrett v. Washington National Ins. Co., 621 F.2d 201 (5th Cir. 1980). While this Court would agree that the factual situations may be somewhat analogous, we do not find their holdings (i.e., that the "transfer" for purposes of the bankruptcy act is the date of the foreclosure sale), to be controlling here in light of the Third Circuit opinions cited above.

In Lovett v. Shuster, 633 F.2d 98 (8th Cir. 1980), when faced with a strikingly similar factual situation (under §67(d)(5) of the former Bankruptcy Act (11 U.S.C. §107(d)(5), the Court of Appeals for the Eighth Circuit held that the "transfer" for the purpose of that section of the Bankruptcy Code took place when the secured party took possession of the pledged securities because state law provided that this constituted the perfection of the security interest, and not when the foreclosure sale took place (which was held after the filing of the petition in bankruptcy).

* * *

Therefore, consistent with the above, the "transfer" of the Debtor's properties for the purposes of 11 U.S.C. §548 transpired when he pledged the stock to PNB, which act perfected its security interest. Since this took place prior to the filing of the bankruptcy petition by more than one year, this Court finds that this "transfer" cannot be avoided. Accordingly,

the Order of the Bankruptcy Court is reversed.

An appropriate Order will issue.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3098

GEORGE E. EWING, Debtor
DONALD R. CALAIARO, Trustee

v.

PITTSBURGH NATIONAL BANK
and COVENTRY CARE, INC.

Donald R. Calaiaro,
Appellant

Appeal From the United States
District Court for the Western
District of Pennsylvania
(D.C. Civil No. 83-2640)
District Judge: Honorable
Carol Los Mansmann

Submitted Under Third Circuit
Rule 12(6)
September 11, 1984
Before: SEITZ, BECKER, and ROSENN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant(s), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant(s).

By the Court,

/s/
Circuit Judge

Attest:

/s/
Betty J. Robinson, Deputy Clerk

Dated: September 18, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3098

GEORGE E. EWING, Debtor
DONALD R. CALAIARO, Trustee

v.

PITTSBURGH NATIONAL BANK
and COVENTRY CARE, INC.

Donald R. Calaiaro,
Appellant

Appeal From the United States
District Court for the Western
District of Pennsylvania
(D.C. Civil No. 83-2640)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit

in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Circuit Judge

Dated: October 15, 1984

IN THE SUPREME COURT OF
THE UNITED STATES

IN RE: GEORGE E. EWING,	)
	)
Debtor	)
	)
DONALD R. CALAIARO, TRUSTEE,	)
	)
Appellant-Petitioner	)
	)
v.	)
	)
PITTSBURGH NATIONAL BANK and COVENTRY CARE, INC.,	)
	)
Appellees	)

CERTIFICATE OF SERVICE

I, Robert O Lampl, certify that on December 13, 1984, I caused three true and correct copies of the foregoing Petition for Writ of Certiorari to be served upon all other parties in this case, in accordance with the Rules of the Supreme Court of the United States, Rule 28.5(b) as follows:

Richard B. Tucker, III
Counsel for Pittsburgh National Bank
1200 Pittsburgh National Bank Building
Pittsburgh, PA 15222
(By Messenger Delivery)

George R. Specter
Counsel for Coventry Care, Inc.
Tenth Floor Frick Building
Pittsburgh, PA 15219
(By Messenger Delivery)

Robert O Lampl /mm

ROBERT O LAMPL
Counsel for Appellant
The Renshaw Building
Ninth Street & Liberty Avenue
Pittsburgh, PA 15222
(412) 392-0330

Office-Supreme Court, U.S.
FILED
JAN 12 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1024

In the Supreme Court of the United States

October Term, 1984

IN RE: GEORGE E. EWING, Debtor
DONALD R. CALAIARO, Trustee,
Petitioner,

vs.

PITTSBURGH NATIONAL BANK and
COVENTRY CARE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Respondent, Coventry Care, Inc. in Opposition to Petition for Writ of Certiorari

GEORGE R. SPECTER, ESQUIRE
(Counsel of Record)
BASKIN AND STEINGUT, P.C.
29th Floor, One Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 562-8660
Counsel for Respondent,
Coventry Care, Inc.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 1

THE QUESTION PRESENTED FOR REVIEW 2

REASONS FOR DENYING THE WRIT 3

I. A Writ of Certiorari should not be granted except where there are special and important reasons therefor 3

II. The intent of Congress in amending §548 of the Bankruptcy Code in 1984 is irrelevant to the present case, and in any event, does not represent a special and important reason for grant of Certiorari 7

III. The decision of the Third Circuit which affirmed the decision of the District Court is not in conflict with Pennsylvania Law relating to property rights of debtors 8

IV. A. Certiorari should be denied because under Section 548(d)(1) of the Bankruptcy Code a transfer occurs when no subsequent purchaser from or creditor of the debtor can acquire an interest in the transferred property superior to that of the transferee 9

B. A transfer under former §548 must be by the debtor, and therefore the sale of collateral by a secured creditor was not within the provisions of §548 15

CONCLUSION 17

TABLE OF CITATIONS

CASES

Pages

Abramson v. Lakewood Bank & Trust Co.,
647 F.2d 547 (5th Cir. 1981), cert. denied
454 U.S. 1164 (1982) 5,6,13

Dean Witter Reynolds, Inc. v. MacQuown,
717 F.2d 859 (3rd Cir. 1983) 9

Durrett v. Washington Nat'l. Ins. Co.,
621 F.2d 201 (5th Cir. 1980) 5,6,13

In re Hulm, 738 F.2d 323 (8th Cir. 1984)
cert. denied., _____ U.S. _____,
105 S.Ct. 398 (1984) 5,6,7

Madrid v. Lawyers Title Insurance Corp.,
725 F.2d 1197 (9th Cir. 1984) 6,7,9,10,11,12,13

Rice v. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70 (1955) 3,4

STATUTES AND RULES

13 Elizabeth, Ch. 5 (1570) 11
11 U.S.C.A. §101(41) 11
11 U.S.C.A. §548 5,7,8,11
11 U.S.C.A. §548(a) 4,7
11 U.S.C.A. §548(a)(2) 11
11 U.S.C.A. §548(a)(2)(B)(i) 11
11 U.S.C.A. §548(d)(1) 5,6,8,9,12
11 U.S.C.A. 1(30), Bankruptcy
Act of 1938 (Repealed) 13
11 U.S.C.A. §101(40) (1979) (amended and
renumbered as §101(48) 1984) 13
Sec. 14(c), Bankruptcy Act of 1938 (Repealed) 14

Pages

Sec. 67(d), Bankruptcy Act of 1938 (Repealed) 16
13 Pa. C.S.A. 8102(a) 9,10
13 Pa. C.S.A. 8102(c) 9
13 Pa. C.S.A. 9105(g) 10
13 Pa. C.S.A. §9304(1) 10
21 P.S. §351 (Purdon 1955) 14
Uniform Fraudulent Conveyance Act 11,12
U.S. Sup. Ct. Rule 17, 28 U.S.C.A. 3

LEGISLATIVE HISTORY

H. Rep. No. 409, 75th Cong., lst Sess. 31-34 12

COUNTERSTATEMENT OF THE CASE

The Respondent, Coventry Care, Inc. ("Coventry"), agrees generally with Petitioner's Statement Of The Case, except that Respondent has set forth *as facts* certain statements which are not facts of this case and which to the knowledge of Coventry are not correct.

In the Statement Of The Case, Petition, p.12, second paragraph, Petitioner states that the sale of the shares was for "an amount equal to the balance of the unpaid principal of $61,602.10 plus interest". To Coventry's knowledge, there remains a balance due on the Debtor's debt to Pittsburgh National Bank ("PNB") in excess of the $72,500.00 sale price of the shares.

Another Statement which is not a fact of this case appears in Petitioner's Argument on page 18 of the Petition. Petitioner states that "the debtor had an equitable interest in the stock beyond the value needed to secure repayment of the loan". It is not a fact of this case that the value of the stock was greater than the total indebtedness of debtor through Pittsburgh National Bank.

THE QUESTION PRESENTED FOR REVIEW

Is a sale of collateral by a secured creditor pursuant to Article 9 of the Pennsylvania Uniform Commercial Code within one year of bankruptcy a transfer under §548 of the Bankruptcy Code when the creditor's security interest in the collateral was perfected more than one year prior to institution of bankruptcy?

REASONS FOR DENYING THE WRIT

Rule 17 of this Court provides that "A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor". The Argument below will make clear that there are no special or important reasons which warrant review by this Court of the decision by the Court below because the Third Circuit's decision, which affirmed that of the District Court, is clearly correct and deals at bottom with questions of routine State law as opposed to important questions of federal law or questions of great public importance. Consequently, the grounds asserted by Petitioner for the exercise of this Court's discretion are wholly without foundation or merit. A review of the arguments raised by Petitioner and a presentation of the reasons in support of denial of the Writ, are presented separately for each issue below.

I. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED EXCEPT WHERE THERE ARE SPECIAL AND IMPORTANT REASONS THEREFOR.

In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), this Court initially granted certiorari and thereafter vacated the writ as improvidently granted. Although *Rice* was decided under former Supreme Court Rule 19, the reasoning therein is equally apt to present Rule 17. This Court said the following on page 74:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the

benefit of the particular litigants. [Citations deleted] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

In *Rice, supra,* after the grant of certiorari and argument, it was brought to the Court's attention that an Iowa statute enacted after commencement of the litigation changed the law of Iowa which was the very subject of the litigation. This Court noted on page 73 that the statute barred the ultimate question presented in the case from again arising in the State. This Court said on pages 76-77 "Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would have hardly have been brought here in the first instance". The same reasoning is applicable to the case at bar. As the Petitioner admits on pages 15-16 of the Petition, Congress has amended Bankruptcy Code §548(a) since inception of this litigation. The amendment is set forth on page 16 of the Petition and provides, in effect, that a trustee may avoid a transfer of the debtor's interest in property regardless of whether such transfer was *voluntarily* or *involuntarily* made. Therefore, the outcome of this case is of concern only to the parties herein so that the case is now at best of isolated significance. Further, it is respectfully submitted that the case at bar does not even rise to the significance of *Rice, supra,* because *Rice,* at least, addressed a question of constitutional dimensions. This case and the few similar to it address only a question which at bottom is one of fair market valuation in State creditor foreclosure proceedings.

The Petitioner's assertion that certiorari should be granted in order to reconcile a split among the Circuits with respect to the subject issue is without merit.

The Petitioner cited *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981) *cert. denied* 452 U.S. 1164 (1982); *Durrett v. Washington National Ins. Co.*, 621 F.2d 201 (5th Cir. 1980); and In *Re Hulm*, 738 F.2d 323 (8th Cir. 1984) *cert. denied*, _____ U.S. _____, 105 S.Ct. 398 (1984) as cases which support Petitioner's position herein. Both *Abramson* and *Durrett* are, at least, initially distinguishable for the following reasons.

§548(d)(1) of the Bankruptcy Code, 11 U.S.C.A. §548(d)(1), specifically defined "transfer" for purposes of §548, as follows:

> For purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

It is significant that neither *Abramson* nor *Durrett* addressed the question of the significance of §548(d)(1). The absence of such consideration in *Abramson* and *Durrett* is significant because in the case at bar, the District Court predicated its decision in principal part upon its interpretation of §548(d)(1). *See* Appendix to Petition, pps. A-37 and A-41. This Court does not have the benefit of the views of the Fifth Circuit panels in *Abramson* and *Durrett* as to their interpretation of §548(d)(1). Therefore, to that extent, there is not the significant split among the Circuits to which Petitioner refers.

Also, both *Abramson* and *Durrett* were decided under the Bankruptcy Act in effect prior to enactment of the Bankruptcy Code in 1978.

There is a split among the Circuits, but Coventry respectfully directs this Court's attention to the fact that Petitioner did not cite the one Circuit case which is in accord with the decision of the District Court, as affirmed by the Third Circuit herein. *In Madrid v. Lawyers Title Insurance Corp.*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied*, _____ U.S. _____, 105 S.Ct. 125 (1984), this Court addressed specifically the significance of §548(d)(1) and distinguished *Abramson* and *Durrett* by holding on page 1201 that the "narrower definition of transfer set out in §548(d)(1)" was determinative of the issue as to when transfer occurred for purposes of a trustee's right of avoidance under §548.

The true split among the Circuits is that created by the decision of the Eighth Circuit in *In Re Hulm, supra.*

Hulm did consider §548(d)(1) and concluded that there could be more than one transfer thereunder, and that any of such transfers which occurred within the one year period preceding bankruptcy was subject to avoidance.

Therefore, to the extent that there is a split among Circuits it is that the Third Circuit (the case at bar) and the Ninth Circuit *(Madrid)* differ in their interpretation of §548(d)(1) from that of the Eighth Circuit *(Hulm).* It is respectfully submitted that this Court has determined most recently that there is no special or important reason which would warrant review of the subject issue because it has denied certiorari in both *Madrid* and *Hulm.* There are no special circumstances or reasons present in the instant case which warrant reversal of such prior determinations.

II. THE INTENT OF CONGRESS IN AMENDING §548 OF THE BANKRUPTCY CODE IN 1984 IS IRRELEVANT TO THE PRESENT CASE, AND IN ANY EVENT, DOES NOT REPRESENT A SPECIAL AND IMPORTANT REASON FOR GRANT OF CERTIORARI.

The Petition does not set forth any legislative history, case law or other applicable reasons in support of the assertion that the Third Circuit's affirmance of the District Court's decision herein was contrary to the intent of Congress. The addition of the word "involuntarily" in §548(a) by Congress in 1984 does not necessarily indicate the intent of Congress in passage of former §548(a). To the contrary, the 1984 amendment is equally susceptible to the interpretation that in 1984 Congress intended to *change* the law rather than *clarify* it as asserted by Petitioner. If this Court were to grant certiorari solely to determine the intent of Congress in enacting former §548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979), it would be engaging in an academic exercise of the sort which resulted in vacation of the Writ previously granted in *Rice, supra.*

III. THE DECISION OF THE THIRD CIRCUIT WHICH AFFIRMED THE DECISION OF THE DISTRICT COURT IS NOT IN CONFLICT WITH PENNSYLVANIA LAW RELATING TO PROPERTY RIGHTS OF DEBTORS.

The District Court decided only one question of State law. That question was as follows: When does a creditor's perfection of a security interest in securities occur? The District Court concluded that perfection occurs when the creditor is given possession of the securities. *See Appendix to Petition,* pgs. A-37 through A-41.

The determination of such question was necessary because a "transfer" is made under §548(d)(1), *supra,* when the "transfer" is perfected under State law. Contrary to Petitioner's assertion in its Argument III, the District Court did not determine that the debtor was not entitled to any excess proceeds which might have resulted from PNB's sale of the pledged stock. *The District Court only determined when the pledge was perfected under State law, and even the Petitioner does not challenge that conclusion.*

A patent review of the District Court's opinion, which was affirmed by the Court of Appeals, manifests clearly that the District Court did not make any of the determinations of law referred by Petitioner in its Argument III.

In all events, Rule 17 of this Court which sets forth considerations governing review on certiorari does not include an alleged mis-interpretation of State law by a federal court. Rule 17 essentially provides that the character of reasons that will be considered relate essentially to conflicts among decisions on important federal questions. Therefore, Petitioner's Argument III is without merit.

IV. A. CERTIORARI SHOULD BE DENIED BECAUSE UNDER SECTION 548(d)(1) OF THE BANKRUPTCY CODE A TRANSFER OCCURS WHEN NO SUBSEQUENT PURCHASER FROM OR CREDITOR OF THE DEBTOR CAN ACQUIRE AN INTEREST IN THE TRANSFERRED PROPERTY SUPERIOR TO THAT OF THE TRANSFEREE.

Section 548(d)(1), *supra,* which establishes the time of the making of a transfer for purposes of §548 states, as follows:

> "... a transfer is made when the transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition."

Federal law determines whether a particular occurrence is a transfer for bankruptcy purposes, while state law determines the time and method of perfection. *Madrid, supra. Dean Witter Reynolds, Inc. v. MacQuown,* 717 F.2d 859 (3rd Cir. 1983) also holds by implication that state law determines the time and method of perfection.

The property of the Debtor in this case was common stock, which is a "security" under the Uniform Commercial Code ("UCC") of Pennsylvania. 13 Pa.C.S.A. 8102(a) and/or 8102(c).

The UCC defines an "instrument" to include, *inter alia,* a "security" (as defined in 13 Pa.C.S.A. 8102, *supra*). 13 Pa.C.S.A. 9105(g).

Under the UCC, perfection of a security interest in instruments is effected by delivery of possession of the instrument to the secured party as set forth in 13 Pa. C.S.A. §9304(1) which provides in relevant part, as follows:

> ... A security interest in instruments ... can be perfected only by the secured party's taking possession ....

Thus, under state law the transfer was perfected by delivery of the securities which occurred outside of the one

year pre-petition period. Opinion of District Court, Appendix to Petition, A-36.

Madrid, supra, is a case essentially identical to the instant case. It involved a foreclosure sale of real estate, but aside from the fact that the case at bar involves securities, the issue and principles are the same. In *Madrid,* the debtor purchased a home financed by first and second deeds of trust. The debtor defaulted under both deeds, and the trustee under the second deed caused the property to be sold at a non-judicial foreclosure sale. *Perfection of the second deed of trust (accomplished by recording) occurred more than one year prior to filing of the bankruptcy Petition.* Seven days after the foreclosure sale, the debtor filed a Petition for reorganization and instituted an action in Bankruptcy Court to set aside the foreclosure sale. The question addressed by the lower courts was whether there had been a transfer of Madrid's property interest within one year prior to filing of the bankruptcy Petition.

After exhaustive analysis, the *Madrid* Court concluded that for §548 purposes the applicable transfer was perfection of the beneficiary's rights under the deed of trust, which transfer was effected more than one year prior to filing of the Bankruptcy Petition, and thus was not avoidable under §548. The Court's analysis included the following review:

Historical Review

The Court noted that the modern law of fraudulent conveyances derives from the 1570 English enactment of 13 Eliz., Ch. 5, which was passed for the protection of creditors, and gave creditors, *inter alia,* the power to avoid conveyances and transfers made to hinder, delay or defraud creditors. Such provisions have been essentially

reenacted in the bankruptcy laws of the United States through and including §548 of the current Bankruptcy Code. The Court stated that:

> "In our short historical review of the fraudulent conveyance statutes we have found no evidence that the lineal ancestors of §548(a)(2) were to be used to attack a secured creditor's enforcement of a lien as a constructive fraudulent conveyance. These statutes instead provide authority for the proposition that conveyances are set aside when there is actual fraud or a situation indicative of fraud, such as the transfer of property for less than reasonable equivalence." *Madrid, supra* at 1200.

Legislative History

The Court reviewed the legislative history of §548 and concluded that the enforcement of a valid lien was not intended to be covered by such section. The Court noted that the Uniform Fraudulent Conveyance Act, a predecessor of constructive fraudulent conveyance statutes, contained no provision similar to §(d)(1) of §548 which defined time of transfer. *Madrid, supra,* at 1200. The Court queried why Congress added such a provision, and concluded as follows:

> "The answer lies in the legislative history, which demonstrates that by defining transfer for fraudulent conveyance purposes in terms of time of perfection, Congress effected two purposes: (1) time of perfection served as the pivotal point in computing the reachback period during which the bankruptcy trustee could set aside fraudulent conveyances; and (2) a secret, i.e., unperfected transfer would not escape the trustee's avoidance powers by the trustee's failure to attack it within the reach-back period, since an

unperfected transfer was not deemed a transfer for §67d purposes. H.Rep. No. 409, 75 the Cong., 1st Sess. 31-34 (1937). Again, the workings of Congress display no intent to treat lien enforcement activities as constructive fraudulent conveyances." *Madrid, supra,* at 1200.

Time of Perfection

The Court concluded that a transfer occurred when the deed of trust was perfected under state law. Therefore, the Court concluded further that since perfection occurred more than one year prior to institution of the bankruptcy proceeding, the transfer was not subject to attack under §548.

Policy Considerations

The Court stated that the debtor was seeking to create a right to redeem real property previously sold at foreclosure proceedings. The Court concluded that creating such a redemption right under bankruptcy laws will adversely affect commercial and real estate laws, long within the domain of the states. Creating a federal *de facto* right of redemption under the bankruptcy laws is clearly contrary to Nevada real property law". Madrid, *supra,* at 1202. The same conclusion is applicable to the Pennsylvania Uniform Commercial Code; i.e., the trustee in the case at bar seeks to create a right, in effect, to redeem personal property previously sold in conformity with Article 9 of the UCC, despite the fact that no such right of redemption exists under the UCC or any other applicable state law. Further, the same policy considerations are applicable to

UCC sales as to foreclosure sales of real estate. For example, participation at such sales would be chilled significantly, and creditors would be far less willing to lend funds on the security of even common stock.

Fifth Circuit Precedent

The Madrid Court reviewed *Durrett, supra* and *Abramson, supra,* and rejected the reasoning and conclusions of both such cases. It is respectfully submitted that the *Madrid* court correctly distinguished *Durrett* and *Abramson.* The Fifth Circuit held in each of such cases that the transfer occurred within the one year period prior to bankruptcy, basing such conclusion upon the broad definition of "transfer" set forth in §11 U.S.C. 1(30) of the Bankruptcy Act of 1938. A similar broad definition of "transfer" is found in §101(40) of the Bankruptcy Code of 1978, 11 U.S.C.A. §101(40) (1979) (amended and renumbered as §101(48) 1984). The Petitioner here relies solely upon such broad definition of transfer. The *Madrid* court noted that the definition of "transfer" in §1(30) was extremely broad, when contrasted with the narrower, more specific definition of "transfer" set forth in §548(d)(1), and said on Page 1201 that "If we were to apply this definition to the case at bar, we would be ignoring the applicable, narrower definition of transfer set out in §548(d)(1). Finally, the *Madrid* court agreed with the dissent in *Abramson supra,* which held that a foreclosure sale is not a transfer by a debtor as required by §548(a), but rather is an involuntary conveyance triggered by the debtor's failure to fulfill some obligation to the creditor. Coventry Care makes the same argument in Argument B below.

It is most important to note again that neither *Durrett* nor *Abramson* addressed the significance of §548(d)(1) and

the definition of "transfer" contained therein. Therefore, this Court does not have the benefit of the Fifth Circuit's views on the meaning of that important section.

In *Dean Witter Reynolds, supra,* the debtor became indebted to a brokerage firm. The debtor suffered substantial losses in 1976. In 1977 the debtor and his wife executed a deed which conveyed their family residence, held by them as tenants by the entireties to the wife alone. There was no consideration for the conveyance, and the deed was not recorded until June 13, 1979. The wife died in December 1979. The plaintiff had obtained a $200,000 judgment against the defendant-debtor on November 13, 1978. One week later the defendant-debtor filed a Petition for bankruptcy. The plaintiff-creditor filed a Complaint in the Bankruptcy Court contending that under §14(c) of the Bankruptcy Act of 1938 that the debtor should not be discharged. The Third Circuit concluded on Page 863 that a transfer is complete for purposes of §14(c)(4) when it is good against bona fide purchasers. The Court said as follows on Page 863:

> "Under Pennsylvania Law, a transfer of real property is good as against a subsequent bona fide purchaser, mortgagee or judgment holder when the deed is recorded. Pa. Stat. Ann. Tit. 21, §351 (Purdon 1955)."

The reasoning in Dean Witter is patently applicable here; i.e., a transfer occurs when perfection thereof is completed. In the case at bar, such transfer was perfected by delivery of possession of the securities, after which time no purchaser from the debtor could have acquired an interest superior to that of PNB in such securities.

Under Pennsylvania law and therefore under §548, it is clear that "transfer" of the stock occurred when PNB perfected its security interest therein by obtaining possession thereof on September 30, 1977, approximately 2 years and 10 months prior to Debtor's bankruptcy filing in August, 1980. Therefore, the foreclosure sale held on April 10, 1980 is not subject to avoidance under §548.

B. A TRANSFER UNDER FORMER §548 MUST BE BY THE DEBTOR, AND THEREFORE THE SALE OF COLLATERAL BY A SECURED CREDITOR WAS NOT WITHIN THE PROVISIONS OF §548.

An examination of the relevant provisions of former §548 patently reveals that the debtor must have been the seller or otherwise a participant in the transaction for the transaction to be subject to that section.

Section 548(a) reads as follows:

> "(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, *if the debtor* [emphasis added]

The above emphasized language "if the debtor" establishes unequivocally that actions of the debtor and only the debtor can effect a transfer which is avoidable under the section.

In *Madrid*, supra, the concurring opinion by Judge Farris was predicated solely upon the issue of whether an avoidable transfer under §548 had to be by the debtor. Judge Farris stated that:

"The problem with Madrid's argument is that she did not transfer the property. After she defaulted, the foreclosure proceeded without her participation or consent. I recognize that the definition of "transfer" at 11 U.S.C. §101(41)... includes "involuntary" transfers, but §548 permits the trustee to set aside a transfer "if the *debtor*... received less than a reasonably equivalent value" (emphasis added). This language contemplates that the debtor was the seller or otherwise participated in the transaction.

...One cannot presume fraud by the debtor in a transaction where the debtor was not a party. Section 67(d) of the prior Bankruptcy Act, virtually identical in all substantive respects to the present §548, applied only to "transfers made... by debtors." If the language of §548 does not reflect the debtor's active role as clearly as that of its predecessor, the purpose and origin of the present statute give clarity of meaning to phrases that might otherwise be ambiguous. I would therefore hold that only transfers where the bankrupt was a participant can be set aside for absence of "reasonably equivalent value". *Madrid, supra,* at 1203-04 (concurring opinion, Farris, J.)

In any event, as set forth in Argument I hereof, §548(a) was amended in 1984 and the above argument is now of concern only to the parties herein.

CONCLUSION

There are no special or important reasons why certiorari should be granted herein. This Court has recently denied certiorari in two cases containing the same basic issue as is present in the subject case. In addition, the statutory provisions which are the subject of this case have been amended since institution of the litigation and

accordingly the result in this case would be a matter of concern only to the litigants.

In all events, the decision of the Court of Appeals for the Third Circuit, affirming the decision of the District Court, was correct as a matter of law.

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE R. SPECTER, ESQUIRE
(Counsel of Record)
BASKIN AND STEINGUT, P.C.
29th Floor, One Mellon Bank Center
500 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 562-8660

Counsel for Respondent,
Coventry Care, Inc.

AFFIDAVIT OF SERVICE

I hereby certify that three (3) true and correct copies of the within Brief by Respondent Coventry Care, Inc. in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, were sent to:

Robert O. Lampl, Esquire
The Renshaw Building
Ninth Street and Liberty Avenue
Pittsburgh, PA 15219

Richard B. Tucker, III, Esquire
Tucker Arensberg, P.C.
1200 Pittsburgh National Building
Pittsburgh, Pennsylvania 15222

by first class mail, postage prepaid, this 11th day of January, 1985.

GEORGE R. SPECTER, ESQUIRE
BASKIN AND STEINGUT, P.C.
29th Floor, One Mellon Bank Center
500 Grant Street
Pittsburgh, Pennsylvania 15219

Attorney for Respondent,
Coventry Care, Inc.

Supreme Court, U.S.
FILED
JAN 12 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1024

IN THE

Supreme Court of the United States

October Term, 1984

IN RE: GEORGE E. EWING, Debtor,
DONALD R. CALAIARO, Trustee,
Petitioner,

vs.

PITTSBURGH NATIONAL BANK and
COVENTRY CARE, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT, PITTSBURGH NATIONAL BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD B. TUCKER, III, ESQUIRE
(Counsel of Record)
GARY P. HUNT, ESQUIRE
TUCKER ARENSBERG, P.C.
1200 Pittsburgh National Building
Pittsburgh, Pennsylvania 15222
(412) 566-1212
Counsel for Respondent,
Pittsburgh National Bank

Batavia Times Publishing Co.
Harold L. Berkolsen
Pittsburgh, Pa. (412) 881-7463

TABLE OF CONTENTS.

	Page
Table of Authorities	i
Statement of the Case	1
Summary of Argument	4
Reasons for Denying Certiorari	5
A. There Are No Special Or Important Reasons For Granting Certiorari In This Case.	5
B. There Is No Need To Grant Certiorari In Any Event, Because The Lower Court's Decision Is Correct	8
Conclusion	13

TABLE OF AUTHORITIES.

Cases

Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981) *cert. denied* 454 U.S. 1164 (1982) 6,12

Cook v. Hudson, 429 U.S. 165 (1976) 6

District of Columbia v. Sweeney, 310 U.S. 631 (1940) 5,6,7

Durrett v. Washington National Ins. Co., 621 F.2d 201 (5th Cir. 1980) 7

In re Alsop, 14 B.R. 982 (Bkrtcy. D. Alaska 1981) *aff'd* 22 B.R. 1017 (D. Alaska 1982) 9,10,11

In re Ewing, 33 B.R. 288 (Bkrtcy., W.D. Pa. 1983) *rev'd* 36 B.R. 476 (W.D. Pa. 1984) *aff'd* 746 F.2d 1466 (3rd Cir. 1984) 2

In re Ewing, 36 B.R. 476 (W.D. Pa. 1984) *aff'd* 746 F.2d 1466 (3rd Cir. 1984) 2,6

In re Ewing, 746 F.2d 1466 (3rd Cir. 1984) 2

Page

In re Hulm, 738 F.2d 323 (8th Cir. 1984) *cert. denied*, _____ U.S. _____, 105 S.Ct. 398 (1984) 6,7,8,9
In re MacQuown, 717 F.2d 859 (3rd Cir. 1983) 9
In re Madrid, 725 F.2d 1197 (9th Cir. 1984) *cert. denied*, _____ U.S. _____, 105 S.Ct. 125 (1984) 6,7,8,9,10,11,12
McKenzie v. Irving Trust Co., 323 U.S. 365 (1945) 8
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 5,6,7
Thompson v. Fairbanks, 196 U.S. 516 (1905) 11

Statutes and Rules

13 Pa.Cons.Stat.Ann. §8102 (Purdon 1984) 9
13 Pa.Cons.Stat.Ann. §9105(a) (Purdon 1984) 9
13 Pa.Cons.Stat.Ann. §9303(a) (Purdon 1984) 9
13 Pa.Cons.Stat.Ann. §9304(a) (Purdon 1984) 9
13 Pa.Cons.Stat.Ann. §9305 (Purdon 1984) 9
13 Pa.Cons.Stat.Ann. §9306(b) (Purdon 1984) 10
Rule 17 of the U.S.Sup.Ct. Rules, 28 U.S.C.A. 5,7
The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) 6
11 U.S.C.A. §101(40) (1979) (amended and renumbered as §101(48) 1984) ..... *passim*
11 U.S.C.A. §548 (1979) (amended 1984) ..... *passim*

Miscellaneous Authorities

Coppel and Kann, *Defanging Durrett: The Established Law of "Transfer"*, 100 Banking L.J. 676 (1983) 11
Zinman, Houle and Weiss, *Fraudulent Transfer According To Alden, Gross and Borowitz, A Tale of Two Circuits*, 39 Bus. Law. 977 (1984) 10,11,12

IN THE

Supreme Court of the United States

October Term, 1984

No. 84-1024

IN RE: GEORGE E. EWING, Debtor,

DONALD R. CALAIARO, Trustee,

Petitioner,

vs.

PITTSBURGH NATIONAL BANK and
COVENTRY CARE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT, PITTSBURGH NATIONAL BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Petitioner Donald R. Calaiaro (hereinafter "the Trustee"), the Trustee in the bankruptcy proceedings of George E. Ewing (hereinafter "Ewing") at Bankruptcy No. 80-1277 in the United States Bankruptcy Court for the Western District of Pennsylvania, filed a Complaint

at Adversary No. 82-104 to avoid an allegedly fraudulent transfer from Respondent Pittsburgh National Bank (hereinafter "PNB")[1] to Respondent Coventry Care, Inc. (hereinafter "Coventry"). After considering Coventry's Motion to Dismiss, joined in by PNB, the Bankruptcy Court declined to dismiss the Trustee's Complaint. *In re Ewing*, 33 B.R. 288 (Bkrtcy., W.D. Pa. 1983). *rev'd* 36 B.R. 476 (W.D. Pa. 1984) *aff'd* 746 F.2d 1466 (3rd Cir. 1984). On appeal, however, the United States District Court for the Western District of Pennsylvania filed an Opinion and entered an Order dated January 19, 1984, wherein it reversed the Bankruptcy Court and ordered that the Trustee's Complaint be dismissed. *In re Ewing*, 36 B.R. 476 (W.D. Pa. 1984), *aff'd* 746 F.2d 1466 (3rd Cir. 1984).

The Trustee thereafter filed an Appeal to the United States Court of Appeals for the Third Circuit. On September 18, 1984, the Third Circuit affirmed without opinion, *In re Ewing*, 746 F.2d 1466 (3rd Cir. 1984); and on October 15, 1984, the Trustee's Petition for Rehearing was denied. The Trustee has now filed a Petition for a Writ of Certiorari with this Honorable Court.

As stipulated by the parties, the facts upon which the Trustee's claim was based were as follows. On or about September 30, 1977, Ewing borrowed $67,000.00 from PNB as evidenced by a 90-day Note and Pledge Agreement. This loan was extended for additional periods of time and on June 27, 1978, Ewing executed a Promissory Note and Pledge Agreement to secure an additional 90-day extension. The Promissory Note and Pledge Agreement provided for Ewing's pledge and deposit with PNB of various shares of the Class A and

[1] A listing of all parent companies, subsidiaries and affiliates of Respondent Pittsburgh National Bank is attached to the Entry of Appearance being filed by Pittsburgh National Bank's counsel.

Class B common stock of Coventry. This stock was legended with restrictions relating to its transfer or assignment.

Following a default in the repayment of the debt to PNB, a closed bid sale was held to liquidate the stock pursuant to PNB's rights under the June 27, 1978 Note and Pledge Agreement. Prior to the sale PNB advertised in the Wall Street Journal and the Pittsburgh Post-Gazzette and sent notices to numerous potentially interested parties advising them of the sale and the conditions thereof. The sale of the stock was consummated on April 10, 1980, with the stock being sold for $72,500.00 to Coventry, the only bidder at the sale.

Thereafter, in August of 1980, Ewing commenced a voluntary Chapter 11 bankruptcy proceeding which was subsequently converted to a Chapter 7 proceeding. On January 15, 1982, the Trustee filed his Complaint seeking to have the sale of the stock rescinded or a judgment entered against PNB and Coventry for the market value of the stock, legal fees and costs, less the amount of the indebtedness to PNB. In his Complaint, the Trustee alleged that PNB's sale of the pledged stock rendered Ewing insolvent and that the sale was for substantially less than a reasonably equivalent value. These allegations were assumed to be true only for purposes of the Motion to Dismiss.

Summary of Argument

Review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Cases having only an isolated significance and no public importance should not be reviewed. In the present case both of the Bankruptcy Code provisions relevant to the dispute were significantly amended while the case was pending on appeal. The proper interpretation of these now outdated provisions is therefore of importance only to the parties. No writ of certiorari should be issued to review this question which is of no public concern.

No writ of certiorari need be issued in any event, because the Third Circuit's affirmance of the lower court was proper and correct. PNB's sale of Ewing's pledged stock in 1980 was not a transfer within the meaning of the fraudulent conveyance provisions of former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984), but was instead the enforcement of the prior transfer under which PNB acquired its security interest. Former Section 548 was intended to apply only to transfers in which the debtor was the seller or otherwise participated in the transaction.

The Trustee's Petition for Writ of Certiorari should therefore be denied.

Reasons For Denying Certiorari

A. There Are No Special Or Important Reasons For Granting Certiorari In This Case.

As clearly delineated in Rule 17 of the U.S. Sup. Ct. Rules, 28 U.S.C.A., "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." No such reasons exist in the present case.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955) (decided under the similar provisions of former Rule 19 of the U.S. Sup. Ct. Rules), this Court elaborated on the criteria under which the Court determines whether a particular case merits consideration. At 349 U.S. 74, the Court stated:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [citations omitted] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

In *Rice* certiorari had been granted and the Court had affirmed without opinion because it was evenly divided. In considering a petition for rehearing, the Court's attention was directed to a statute enacted after the litigation in question had been initiated. The statute barred the question presented from again arising. Because the case thus had only an isolated significance, the Court vacated its affirmance and dismissed the writ of certiorari as having been improvidently granted. See also *District of Columbia v. Sweeney*, 310 U.S. 631 (1940)

(certiorari denied because the tax was laid under a statute which had been repealed and the question was therefore not of public importance). *Cf. Cook v. Hudson*, 429 U.S. 165 (1976) (writ of certiorari dismissed as improvidently granted in light of intervening Supreme Court decision and state statute).

In the present case a similar situation exists. The issue being litigated is whether the sale of Ewing's stock by PNB was a transfer within the meaning of the fraudulent transfer provisions of the Bankruptcy Code. However, after the initiation of this lawsuit both 11 U.S.C.A. §101(40) (1979) (amended and renumbered as §101(48) 1984) and 11 U.S.C.A. §548 (amended 1984), the relevant Bankruptcy Code provisions, were significantly amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). Thus, regardless of whether the Trustee or PNB and Coventry were correct with respect to the interpretation of the prior bankruptcy law, the resolution of that question is now only of significance to the litigants in this case. Compare *Rice v. Sioux City Cemetery, supra.* The question is no longer of public importance. Compare *District of Columbia v. Sweeney, supra.* There are, therefore, no special or important reasons for granting certiorari in this case.

The Trustee argues that there is a split in the Circuits with respect to this issue and that certiorari should therefore be granted. Compare *In re Madrid*, 725 F.2d 1197 (9th Cir. 1984) *cert. denied*, _____ U.S. _____, 105 S.Ct. 125 (1984); and *In re Ewing*, 36 B.R. 476 (W.D. Pa. 1984) *aff'd without opinion* 746 F.2d 1466 (3rd Cir. 1984) with *In re Hulm*, 738 F.2d 323 (8th Cir. 1984) *cert. denied*, _____ U.S. _____, 105 S.Ct. 398 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981) *cert. denied* 454 U.S. 1164 (1982) (decided

under the prior Bankruptcy Act); and *Durrett v. Washington National Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (decided under the prior Bankruptcy Act). This apparent split has become of isolated significance, however, because of the amendment of those provisions of the Bankruptcy Code which underlay the Circuit Courts' differences of interpretation. Indeed, this Court has apparently recognized the lack of special and important reasons for reviewing these now outdated provisions because it has recently denied certiorari in both the *Madrid* case and the *Hulm* case despite their obviously opposing conclusions.

Similarly without merit is the Trustee's argument that certiorari should be granted because the Third Circuit's decision is contrary to the intent of Congress. While a determination of Congress' intent when it enacted former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984), might satisfy a scholarly interest in the question, it would be an academic exercise solely for the benefit of the litigants in this case. The resolution would be of no public importance. See *District of Columbia v. Sweeney*, *supra*. *Cf. Rice v. Sioux City Cemetery*, *supra*.

Finally, the Trustee argues that certiorari should be granted because the *Ewing* case is in conflict with Pennsylvania decisions concerning the property rights of pledgors under the Pennsylvania Uniform Commercial Code, Pa. Cons. Stat. Ann. §§1101 *et seq.* (Purdon 1984). A conflict between a federal court of appeals and a state court of last resort is only a basis for granting certiorari, however, where a federal question is involved. See Rule 17.1(a) of the U.S. Sup. Ct. Rules, 28 U.S.C.A. Thus, to the extent the Trustee is claiming that the lower court improperly interpreted Pennsylvania law, there is no federal question involved, and this Court should decline to take jurisdiction.

B. There Is No Need To Grant Certiorari In Any Event Because The Lower Court's Decision Is Correct.

Former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984), provided in relevant part:

> (a) The trustee may avoid, any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—
>
> * * *
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation, . . .

Although the Trustee alleged that PNB's sale of the pledged stock rendered Ewing insolvent and that the sale was for substantially less than a reasonably equivalent value, the Trustee could only have stated a claim against PNB and Coventry if PNB's sale of the pledged stock to Coventry was a "transfer" within the meaning of former Section 548 of the Code, 11 U.S.C.A. §548 (1979) (amended 1984).

The question of whether a particular occurrence is a transfer for purposes of the Bankruptcy Code is a matter of federal characterization. See *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945); *In re Madrid, supra; In re*

Hulm, supra. Former Section 548(d)(1) of the Code, 11 U.S.C.A. §548(d)(1) (1979) (amended 1984), specifically defined "transfer" as follows:

> For purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

Thus, for purposes of former Section 548 a transfer was made when it was so far perfected that a bona fide purchaser from the debtor could not have acquired an interest in the property superior to that of the original transferee. *In re Madrid, supra; In re Alsop,* 14 B.R. 982 (Bkrtcy., D. Alaska 1981) *aff'd* 22 B.R. 1017 (D. Alaska 1982). *Cf. In re MacQuown,* 717 F.2d 859 (3rd Cir. 1983).

The question of when a transfer has been so far perfected as to be good against a subsequent bona fide purchaser is a matter to be decided under the applicable state law. *In re Madrid, supra; In re Alsop, supra.* Under Pennsylvania law, there is no question but that PNB perfected its security interest when Ewing pledged and deposited his stock with PNB. See 13 Pa. Cons. Stat. Ann. §§9303(a), 9304(a), 9305, 8102 (definition of "security") and 9105 (definition of "instrument") (Purdon 1984).

There can be no real dispute, therefore, but that the pledge and deposit of Ewing's stock with PNB constituted a transfer within the meaning of 11 U.S.C.A. §548(d)(1) (1979) (amended 1984). Since the pledge and

deposit of Ewing's stock with PNB occurred more than a year prior to Ewing's initiation of bankruptcy proceedings, the transfer was not subject to attack under the former provisions of 11 U.S.C.A. §548 (amended 1984).

It was the Trustee's contention, however, that the involuntary sale of the stock on April 10, 1980, also resulted in a "transfer" of Ewing's equitable interest in the stock. The Trustee's argument focused primarily upon the question of whether the debtor maintained any interest in the collateral after he had pledged it. The relevant concern, however, was not whether such an interest existed, but whether the foreclosure of that interest through an involuntary sale to enforce PNB's rights as a secured party constituted a transfer within the meaning of former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984). Clearly it did not.

As noted above, for purposes of former Section 548 a transfer was made when it was so far perfected that a bona fide purchaser from the debtor could not acquire an interest in the property superior to that of the original transferee. *In re Madrid, supra; In re Alsop, supra.* Thus, the transfer occurred when PNB perfected its security interest so that no subsequent purchaser from Ewing could acquire an interest in the stock which was superior to that of PNB. Whatever equitable interest in the stock Ewing may have retained was clearly not superior to PNB's security interest; and any conveyance by Ewing of his equitable interest in the stock would always be subject to the pledge and PNB's rights thereunder. See 13 Pa. Cons. Stat. Ann. §9306(b) (Purdon 1984); Zinman, Houle and Weiss, *Fraudulent Transfer According To Alden, Gross and Borowitz, A Tale of Two Circuits*, 39

Bus. Law. 977, 1000 (1984). For purposes of former Section 548 the transfer occurred when PNB's security interest was perfected so that it was superior to the interest of any purchaser at a subsequent sale by Ewing of his equitable interest. PNB's sale of the stock to Coventry was not a transfer within the meaning of former Section 548, but was instead the enforcement of the previous transfer under which PNB acquired its security interest. Coppel and Kann, *Defanging Durrett: The Established Law of "Transfer"*, 100 Banking L.J. 676, 678 (1983).

In arguing to the contrary, the Trustee attempted to utilize the broad general definition of "transfer" then contained in former Section 101(40) of the Bankruptcy Code, 11 U.S.C.A. §101(40) (1979) (amended and renumbered as §101(48) 1984). It was, however, the more limited definition of former Section 548(d)(1) which controlled. *In re Madrid, supra; In re Alsop, supra.* Former Section 548(d)(1) specifically provided that its provisions were applicable "For purposes of this section." Thus, what might have constituted a transfer under former Section 101(40) was not necessarily a transfer under former Section 548. See *In re Madrid, supra; In re Alsop, supra.* For purposes of former Section 548's avoidance provisions, only Section 548(d)(1) transfers were relevant.

The Trustee's arguments also overlooked or ignored this Court's precedent, as well as that of several of the Circuit Courts of Appeal, all of which had concluded in essence that the pre-petition enforcement of a valid lien was not a transfer within the meaning of the bankruptcy laws. See *Thompson v. Fairbanks*, 196 U.S. 516 (1905) and the numerous Circuit Court cases and other authorities compiled and discussed in Coppel and Kann, *supra* at 682-691.

Moreover, it is clear that former Section 548(a) was intended to apply only to transfers in which the debtor was the seller or otherwise participated in the transaction. *In re Madrid, supra* (Farris, J. concurring). See also *Abramson v. Lakewood Bank & Trust Co., supra* (Clark, J. dissenting). This limited scope is substantiated by a review of the origins of former Section 548 as developed by the Ninth Circuit in *In re Madrid, supra*, and by the authors in the article by Zinman, Houle and Weiss, *supra*.

> As was true with . . . earlier fraudulent conveyance laws, [former] Section 548 [was] not primarily concerned with the "preservation of the debtor's estate" or with "ensur[ing] a fair return on the debtor's assets for the benefit of all creditors" . . . . Rather, these fraudulent conveyance laws have always sought primarily *to prevent transfers by the debtor* that place the debtor's property beyond the reach of creditors who are entitled to realize upon that property. [footnotes omitted, emphasis added]

Zinman, Houle and Weiss, *supra*, at 994. Thus, under former Section 548 only transfers where the debtor was a participant could be set aside for the absence of reasonably equivalent value. *In re Madrid, supra* (Farris, J. concurring). Because Ewing did not participate in the April 10, 1980, sale of the stock to Coventry, the provisions of former Section 548 had no applications.

Conclusion

Because the provisions of both former Sections 548 and 101(40) have been substantially amended since the initiation of the within lawsuit, the determination of the correct interpretation of their prior wording has become a matter of concern only to the participants in this lawsuit, and is without any public importance. There are, therefore, no special or important reasons for granting certiorari in this case.

Moreover, there is no need to grant certiorari in this case because the affirmance of the lower court by the Third Circuit Court of Appeals was, in any event, proper and correct.

The Trustee's Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

RICHARD B. TUCKER, III, ESQUIRE
(Counsel of Record)
GARY P. HUNT, ESQUIRE
TUCKER ARENSBERG, P.C.
1200 Pittsburgh National Building
Pittsburgh, Pennsylvania 15222
(412) 566-1212

Counsel for Respondent,
Pittsburgh National Bank